

In The Matter Of:
The Shane Group v.
Blue Cross Blue Shield of MI

Motions Hearing
November 12, 2014

Cheryl E. Daniel, Official Federal Court Reporter
313.961.9082

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
THE SHANE GROUP, INC.,
Class Plaintiffs,
V Case No. 10-14360
BLUE CROSS BLUE SHIELD OF MICHIGAN,
Defendant.

_____ /

MOTIONS HEARING
Before the Honorable Denise Page Hood, U.S.
District Judge, 231 W. Lafayette, Courtroom 251,
Detroit, Michigan.
Wednesday, November 12, 2014

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1 Wednesday, November 12, 2014

2 Detroit, Michigan

3 At approximately 2:00 p.m.

4 THE CLERK: Calling case number 10-14360,
5 The Shane Group and others versus Blue Cross Blue Shield
6 of Michigan.

7 THE COURT: Good afternoon, everyone. You
8 may be seated.

9 We're here on -- well, why don't I do this.
10 Why don't the Class Plaintiffs and the Defendant Blue
11 Cross Blue Shield put their appearances on, and then I
12 will note the objectors who are present. And then I
13 will ask the other parties related to the motion to
14 intervene for purposes of unsealing to note who they
15 are. And then I don't know if we need other interested
16 parties or Counsel on the docket, if they want to put
17 their names on, but they're welcome to do so.

18 But let's start with the Class Plaintiffs.

19 MR. MILLER: Good afternoon, Your Honor.
20 Powell Miller on behalf of Class Plaintiffs.

21 MR. SMALL: Good afternoon, Your Honor,
22 Daniel Small with Cohen Milstein on behalf of the Class
23 Plaintiffs.

24 MR. GUSTAFSON: Good afternoon, Dan
25 Gustafson from Gustafson Gluek on behalf of the

1 Plaintiffs.

2 MS. OLIVER: Alyson Oliver on behalf of the
3 Class Plaintiffs.

4 MR. ISQUITH: Good afternoon, Your Honor,
5 Fred Isquith from New York on behalf of the Class
6 Plaintiffs.

7 THE COURT: I don't know if I have your name
8 on here at all.

9 MR. ISQUITH: I S Q U I T H; Fred.

10 THE COURT: Okay. Blue Cross Blue Shield.

11 MR. HOFFMAN: Your Honor, Bruce Hoffman from
12 Hunton Williams here for Blue Cross Blue Shield.

13 MR. STENERSON: Good afternoon, Judge, Todd
14 Stenerson on behalf of Blue Cross Blue Shield of
15 Michigan.

16 MR. HARRIS: Your Honor, Alan Harris from
17 the Bodman firm on behalf Blue Cross Blue Shield.

18 MR. PHILLIPS: Robert Phillips, in-house
19 Counsel for Blue Cross.

20 THE COURT: And who else is at counsel
21 table?

22 MR. WALTERS: Good afternoon, Your Honor.
23 Bryan Walters from the Varnum law firm. We're here
24 representing the self-insured objectors, ADAC and that
25 group.

1 MR. ANDREWS: Chris Andrews, objector, pro
2 se.

3 MR. THOMPSON: Darrell Thompson, Blue Care
4 Advantage member.

5 THE COURT: I have also from ADAC Bryan
6 Walters.

7 MR. WALTERS: Yes, Your Honor.

8 THE COURT: And then I have from Warner
9 Norcross for Priority Spectrum, Brian Masternak.

10 MR. MASTERNAK: Yes, Your Honor. I will
11 also be representing Holland Hospital at this time.

12 THE COURT: Anybody else want to be
13 recognized?

14 MR. JORISSEN: Jonathan Jorissen on behalf
15 of Ascension Health and on behalf of Borgess Health.

16 COURT REPORTER: May I have the spelling of
17 your last name?

18 MR. JORISSEN: J O R I S S E N.

19 THE COURT: And you're representing?

20 MR. JORISSEN: Ascension Health and Borgess
21 Health. We filed an objection.

22 THE COURT: Right, okay.

23 And who else? Anybody else want to have
24 their name on the record?

25 MS. OLIVER: Judge, if I may, I have a young

1 lady here telling me she is here on behalf of her mom,
2 so she might want to address the Court.

3 THE COURT: You're here on behalf of
4 Margaret Schubert?

5 MS. DANCY: No, Elaine Trawick.

6 THE COURT: Did you file anything?

7 MS. DANCY: No, it was filed under the Shane
8 Group is what I'm told.

9 COURT REPORTER: And your name is?

10 MS. DANCY: Sonya Dancy; S O N Y A, D A N C
11 Y. And my sister Ronya Ferguson; R O N Y A, F E R G U S
12 O N. And our brother, De'Angelo Trawick; T R A W I C K.

13 THE COURT: And you're here for Elaine
14 Trawick?

15 MS. DANCY: Yes.

16 THE COURT: Who else?

17 MR. ETTINGER: David Ettinger from Honigman
18 on behalf of Mid-Michigan Health and eight others who
19 are objecting to the unsealing.

20 THE COURT: Okay. Anyone else?

21 MR. ANDREWS: Yes, I'm Michael Andrews. I'm
22 an objector to the Class.

23 THE COURT: Did you file a writing?

24 MR. ANDREWS: I did, Your Honor. My
25 representative is here.

1 THE COURT: When did you file something.
2 Did you file a writing?

3 MR. ANDREWS: Yes.

4 THE COURT: Did you file it with the Court
5 or with a party?

6 MR. ANDREWS: With a party. My agent is
7 right there.

8 THE COURT: And what is your name?

9 MR. ANDREWS: Michael Andrews, pro se
10 objector. I filed on behalf of all of us. They're not
11 going to speak today.

12 THE COURT: I will just put them all under
13 one.

14 Very good. We're here on a couple of
15 motions. One is a motion to intervene for the limited
16 purpose of unsealing records and adjourn the fairness
17 hearing filed by ADAC and others. And then the class
18 action fairness hearing to which objections and letters
19 were filed. Then there is a class counsel's motion for
20 attorney's fees, a motion for final approval of the
21 class action settlement, and a motion to strike objector
22 Andrews' surreply, which I will take on the briefs.
23 And also recently filed, which I'll also take on the
24 briefs, are responses and motions to intervene for the
25 limited purpose to respond opposing motion to unseal by

1 26 objectors filed by Mid-Michigan Health, Alpena
2 Regional, Priority Health and Spectrum, Holland
3 Community Hospital and Ascension Health. And they're
4 all filed -- well, three of them -- well, Mid-Michigan
5 was filed on November 6th; Alpena on November 7th;
6 Priority Health on November 10th. And then two were
7 just filed yesterday.

8 And I would note that yesterday, the Court
9 was closed for the national holiday of Veterans Day and
10 those are the Holland Community Hospital and Ascension
11 Health.

12 I would propose the following: That on the
13 motion to intervene, there be 10 minutes for the movant
14 and 15 minutes combined response by the parties. And
15 then on the class action fairness hearing that there be
16 two minutes for those filing pro se and 15 minutes for
17 the 26 objectors, ADAC, and others, which is
18 approximately -- well, not quite. And then 20 minutes
19 for the response by Class Counsel and 15 minutes
20 response by Blue Cross.

21 And then I would suggest that we see where
22 we are because some of the objections include an
23 objection that involves the motion for attorneys' fees
24 and I think everyone is probably going to incorporate in
25 their arguments something relative to the final approval

1 of the class action settlement.

2 Do you have a different proposal? Not
3 hearing one.

4 MR. MILLER: Just to clarify, Your Honor,
5 we're allocated 20 minutes to the Defendant's settlement
6 and 20 minutes to respond to the objections. Are 20
7 minutes allocated to the argument because Mr. Small will
8 be defending the settlement and me responding to the
9 objections.

10 THE COURT: And you need more than 20 or 25
11 minutes to do that?

12 MR. MILLER: Twenty each would cover it,
13 Your Honor.

14 THE COURT: You know that is a lot.

15 MR. MILLER: I'll cut it down.

16 THE COURT: Yes, sir?

17 MR. ANDREWS: Instead of two minutes, I
18 would like five minutes, please.

19 THE COURT: That is Mr. Andrews, right?

20 MR. ANDREWS: Yes, Judge.

21 THE COURT: That is agreeable to everyone?

22 MR. WALTERS: Yes, Your Honor.

23 THE COURT: Thank you for someone
24 responding.

25 This is the motion to intervene for the

1 limited purpose of unsealing the record. Mr. Walters,
2 you're doing that?

3 MR. WALTERS: Yes, Your Honor.

4 THE COURT: That's why you were ready to go.

5 MR. WALTERS: I know we're on a tight
6 schedule, so I do appreciate you even giving me 10
7 minutes to argue this. I will try to get to the point
8 on this issue.

9 THE COURT: I have read everything except
10 the two items filed yesterday. One of them I'm not
11 complete on and that is because I'm in a jury trial and
12 so I just got it this morning.

13 MR. WALTERS: Thank you, Your Honor.

14 Unfortunately, Counsel for the named
15 Plaintiffs and for Blue Cross have put the class members
16 and the third party hospitals who produced documents in
17 a very difficult situation with regard to the upcoming
18 fairness hearing.

19 Our clients are objectors to the proposed
20 settlement and have a right to fully and meaningfully
21 participate in the fairness hearing.

22 The crux of the decision this Court is going
23 to make in the fairness hearing involves a balancing of
24 the likelihood of success on the merits of the case and
25 the amount of potential damages versus the relief that

1 the class members would receive in a proposed
2 settlement. That is the core issue that the Court needs
3 to weigh in deciding whether or not this settlement is
4 fair.

5 A fundamental part of investigating that
6 likelihood of success and the amount of potential
7 damages here is some understanding and some public
8 vetting of what the underlying facts of the case are and
9 what the basis for damages in this case are.

10 Class actions, as you know, Your Honor, are
11 different from regular cases where the Court can
12 normally rely on the adversarial process to sort out
13 whether or not a settlement is fair and reasonable.

14 Class action cases are different because of
15 the possibility of the risk that Plaintiff's Counsel
16 will put its own interest ahead of the class's interest
17 in the settlement.

18 So there are two different ways the court
19 addresses this in the class action context. The first
20 is that the court is under its own obligation to
21 carefully scrutinize the proposed settlement. And I'm
22 very confident the Court will do so.

23 But the second mechanism for this is that
24 the Court calls a fairness hearing and allows for the
25 adversarial process to take place by allowing objections

1 by class members. But for that to work, class members
2 have to be able to present meaningful information to the
3 Court about the likelihood of success of the case, the
4 potential for damages in the case, so that there can be
5 that weighing as to whether or not the settlement is
6 fair, reasonable or adequate.

7 The problem we have here is that all of the
8 documents, all of the documents submitted by both the
9 Plaintiff's Counsel and Defense Counsel with regard to
10 approval of the proposed settlement were filed under
11 seal. In their entirety with the Court.

12 So the motion for approval of the class
13 settlement that was filed in the spring and early summer
14 before the Court approved it, and the 90 exhibits that
15 the Plaintiffs attached to justify why this settlement
16 was fair, reasonable and adequate, the entirety of that
17 information was filed under seal and is not available to
18 the class members to review, not available to the class
19 members to look at to help advocate to the Court about
20 whether or not the settlement is fair, reasonable and
21 adequate.

22 The same can be said of Blue Cross's
23 submission. Blue Cross's entire brief with regard to
24 the proposed settlement and the 42 exhibits to that were
25 also filed under seal.

1 In addition, the Daubert motion challenging
2 the damages report was also filed in its entirety under
3 seal, which means that the objectors have no ability to
4 assess whether or not this 120 million dollar damages
5 report that Dr. Leitzinger has relied upon so heavily
6 upon as the basis for settlement has any underlying
7 validity at all. Whether or not that is a credible
8 report or not. Whether that number should be bigger,
9 whether that number should be smaller. There is no
10 ability for the parties to meaningful advocate with
11 regards to that.

12 We have laid out in our brief, Your Honor,
13 there is a very, very strong public right to access to
14 judicial documents.

15 We're not looking to uncover every single
16 document that was produced in discovery, we are looking
17 to have access to the documents that the parties
18 presented to the Court to justify the settlement in this
19 case.

20 The Sixth Circuit has held that only the
21 most compelling reasons can justify non-disclosure of
22 judicial records.

23 Now, of course, ultimately the Court is
24 responsible for supervising its own docket and can make
25 the decision to seal records. Of course we're not

1 saying that is not possible. But, it has to happen in a
2 way, and the precedence is very clear on this, the Court
3 is making specific findings that the sealing of these
4 particular records is necessary; that the sealing of
5 these records is essential to preserve some higher
6 value, some confidentiality higher value than the
7 class's access to this information; and that the sealing
8 of records is narrowly tailored to meet that interest.

9 That clearly hasn't happened here, Your
10 Honor; the exact opposite has happened here.

11 We have had essentially a lump and dump. A
12 black box of documents that were filed with the Court
13 under seal justifying the settlement and none of that
14 has been made available to the public. Not even a
15 redacted version of that information has been made
16 available to the objectors or the class members.

17 Even the hospitals who are here objecting
18 don't know for sure what is in there in terms of whether
19 any of their records and what of their records are
20 included and what was filed under seal with the Court.

21 Now, it is not the hospitals' fault that all
22 this information was just filed under seal with the
23 Court, I understand why they're here and why they're
24 concerned with regard to that information. We don't
25 know what is there. We literally have no way, Your

1 Honor, to know what is included in this black box of
2 documents that was filed under seal by both parties in
3 this case.

4 What we are looking for here, Your Honor, is
5 some ability to access those records, and there are a
6 couple of different ways the Court can do that, but what
7 we -- but the easiest way to do so would be to unseal
8 the records because of the public's strong interest in
9 having access to this information.

10 A couple of objections were raised that I
11 want to respond to with regards to our motion.

12 First of all, the question was made as
13 regard to the timeliness of our motion to unseal the
14 records.

15 Your Honor, the motion here was clearly
16 timely. My clients did not even receive notice of the
17 settlement here until August and they acted promptly
18 upon receiving that notice to move forward with the
19 process in terms of contacting my law firm for advice
20 and we investigated and gave them options for what to
21 do: You've got a class action settlement notice, you
22 can object, you can opt out, you can file a claim.

23 Our clients decided in mid-September that
24 they were going to object and attempt to seek access to
25 these records.

1 We filed our objection on a timely basis on
2 September 24th. We tried to work things out with
3 Counsel for the Plaintiffs and Counsel for Blue Cross
4 with regards to the records. We spent almost two weeks
5 trying to work things out. We narrowed the list of what
6 we were seeking access to to only four documents,
7 documents filed with the Court that were most directly
8 relevant to the settlement in this case, and we tried to
9 see if we could work out a way to get redacted
10 information to us. To get the guts of the information
11 to us while sealing the confidential information.

12 The problem, Your Honor, and we attached as
13 exhibits some examples of this, the redactions came back
14 like this, Your Honor, (Indicating to document) where
15 the whole page is blacked out and we're left with titles
16 or case citations.

17 All of the relevant information was redacted
18 in what was shared with us in that voluntary process to
19 try to see if we could work this out.

20 So we have clearly filed a timely motion
21 here, Your Honor.

22 We're not on a fishing expedition, Your
23 Honor, we're here because our clients have a direct
24 interest in this case.

25 There has been essentially ad hominem

1 attack against my firm and my clients saying we're
2 fishing for information for another case and that is
3 absolutely not true at all, Your Honor.

4 It is absolutely true that we have
5 relationships with these clients because of prior work
6 we have done for them with regard to issues that they
7 had with Blue Cross. And there is also no doubt that my
8 clients have some skepticism with regards to their
9 dealings with Blue Cross because of those prior
10 relationships. But our clients have a perfectly
11 legitimate and reasonable interest in obtaining access
12 to this information.

13 We can't count on Plaintiff's Counsel here
14 to represent our interests. That is the whole reason
15 you have a fairness hearing is to get the view of third
16 parties of class members who may have a different
17 perspective from Plaintiff's Counsel with regards to the
18 settlement.

19 We meet the factors for this very limited
20 purpose, Your Honor.

21 There are seven million class members
22 estimated in this case. That is the estimate that
23 Plaintiff's Counsel have made. Individuals,
24 self-insured plans, insurance companies. There is a
25 very compelling public interest in those class members

1 having access to this information.

2 Now, what do we do with the fact that this
3 information has been identified as confidential? We
4 know under the Court's precedence from the Sixth Circuit
5 and the Supreme Court that only the most compelling
6 reasons can justify non-disclosure of judicial records.

7 We also know that we haven't had that
8 specific finding, that narrow tailoring of looking at
9 document by document, piece by piece to see what is so
10 confidential that it should be hidden from the public
11 view with regard to this settlement and what should not.

12 That process has not happened. It was a
13 lump and dump, a black box of thousands and thousands of
14 pages that were filed with the Court entirely under
15 seal.

16 There are a couple different ways that we
17 can tackle that. One would be to unseal the records
18 entirely.

19 Under the current record before the Court,
20 the Court could very easily do that because there has
21 not been sufficient information presented to the Court
22 to overcome the strong interest the public has in access
23 to this information.

24 But I understand why the Court might be
25 reluctant to do so. I mean, there are third parties

1 that produced this information and why should they be
2 punished for the tactical decisions of Plaintiff's
3 Counsel and Defense Counsel in filing this information
4 en masse with the Court.

5 A couple other ways that we might tackle
6 this. One way would be the way that it happens in most
7 cases to require a redacted version to be filed for
8 public consumption and then an unredacted version on
9 file with the court. That is what typically happens
10 when cases are filed under seal.

11 Our problem here with that, Your Honor, is
12 that we tried to do that voluntarily with Counsel for
13 the parties already and we ended up with pages and pages
14 of redactions that basically gutted any of the relevant
15 information in the factual record that would be relevant
16 to the Court's assessment as to whether or not this is a
17 fair and reasonable settlement or not.

18 For example, Blue Cross, in its briefs, has
19 generically said over and over again that there is a
20 bunch of testimony from hospitals saying that the MFN
21 agreements did not result in any cost increases.

22 Well, I would sure like to see and
23 understand that to be able to assess whether or not that
24 testimony is strong or not, whether or not that
25 testimony really says what Blue Cross's Counsel says it

1 says in terms of how it is being represented. There is
2 a public interest in having access to that information.
3 However, that information is filed completely under seal
4 and we don't have the ability to look at that.

5 So doing a redaction here, Your Honor, I
6 would submit is not going to work out because we're
7 going to end up with pages that look like this and we're
8 just going to be back before you or the magistrate judge
9 again dealing with the redactions and why the redactions
10 didn't happen.

11 Another option, Your Honor, would be to do
12 the grind, which is what is typically required. An in
13 camera review of each document that is filed under seal
14 in order to identify whether or not it was properly
15 sealed in its entirety, whether there is certain parts
16 of it that should be sealed and other parts that should
17 be unsealed. We could work through that with the
18 magistrate judge or with Your Honor.

19 And the significance of this issue would
20 justify that. That would take some work, no doubt about
21 that, but this is a big case. This is a big deal. And
22 it affects the rights of seven million potential class
23 members. To give them the time to do that would be
24 justified.

25 But there is another alternative, at least

1 another alternative that I've identified, although I'm
2 certainly open to the Court's direction to where else we
3 might go with this, because there are very few objectors
4 here and we're the only party that has asked to see
5 these documents, the Court could give us attorneys
6 eyes-only access to this information and then allow us
7 to come to the Court with any particular information
8 that we think is critical to the Court's analysis on the
9 fairness. And then we would narrow down the field of
10 what is really at issue, which documents and how many
11 documents are at issue to something that is a lot
12 smaller than 90 exhibits to one brief or 40 or 50 to
13 another brief.

14 It might be that once the attorneys see the
15 90 exhibits attached to the Plaintiff's motion for class
16 certification that only three or four of them really
17 matter. And if we could narrow that down to three or
18 four, then we could work with Plaintiff's Counsel, Blue
19 Cross's Counsel and with the Counsel for the hospitals
20 or whatever third party it was that produced the
21 documents to see if we could work through a way to
22 redact or narrow that information. If we can't , we
23 come back to the court, come back to the magistrate
24 judge or to Your Honor to deal with that.

25 So this is a way that we could try to tackle

1 this.

2 Your Honor, I want to very quickly say, Your
3 Honor, because I sense that Blue Cross may respond on
4 this, Blue Cross's brief makes mention of the fact that
5 they offered us attorneys' eyes only view of documents
6 and we rejected.

7 What was discussed with Blue Cross's Counsel
8 in that regard was attorneys' eyes only review of
9 redacted documents. And our response to that was why do
10 we need attorneys eyes only review of redacted
11 documents, if it is redacted and the confident
12 information is gone, anybody should be able to look at
13 it.

14 So we haven't had a discussion about an
15 attorneys eyes only review of the information and I
16 think under the circumstances that would be the best way
17 to deal with this.

18 In conclusion, Your Honor, because I know
19 I'm probably over --

20 THE COURT: You are over, yes.

21 MR. WALTERS: It would be unfair and
22 unreasonable for the Court to keep all documents that
23 were submitted in support of the settlement under seal.

24 The Plaintiff's Counsel and Blue Cross made
25 strategic decisions about what information does the

1 Court need access to in order to understand the proposed
2 settlement. They submitted that information as part of
3 their motions. That information should be available at
4 some level for review by the public so that we can
5 assist the Court in its role of carefully scrutinizing
6 the settlement.

7 That's the whole reason why you have a
8 fairness hearing is so that objectors can stand up and
9 meaningfully participate.

10 But when the substantive information about
11 the case, about what were the affects of these MFN
12 agreements, what were the potential damages from these
13 MFN agreements, when that substantive information is
14 sealed from the other class members, the class members
15 don't have the ability to meaningful participate in the
16 settlement. Or at least it's certainly hindered, Your
17 Honor.

18 So we would ask the Court to either unseal
19 the records in their entirety because of the strong
20 public interest in this information or at least adopt
21 some sort of process that would allow the objectors to
22 access this information and present relevant information
23 to the Court as part of its objections.

24 And we would ask that our objections to the
25 fairness hearing be postponed until we have the

1 opportunity to review those documents and argue to the
2 Court.

3 We're not asking for the whole fairness
4 hearing, everyone here has taken the time to get here,
5 but as it relates to our clients' objections, we would
6 ask that the Court allow us a time to be heard at a
7 later date on our specific objections based on our
8 review of those currently sealed documents. Thank you,
9 Your Honor.

10 THE COURT: Thank you.

11 MR. HOFFMAN: We'll try to be quicker than
12 that, Your Honor.

13 Your Honor, Bruce Hoffman on behalf of Blue
14 Cross.

15 I'm going to respond I think relatively
16 briefly with a number of points, not too many.

17 But the first thing I want to say, and I
18 think this is a theme that will run throughout a couple
19 of the remarks to be made, is there are a number of
20 statements made by the objectors in connection with the
21 unsealing issue which really aren't accurate. And I'm
22 going to come back to this particular one, but it is not
23 correct that the filings in connection with the
24 settlement were filed under seal.

25 The filings in support of preliminary

1 approval were public. They were available for review.
2 They have been reviewed. That, Your Honor, is the
3 information to which objectors are normally entitled.

4 This hearing, the fairness hearing, is not a
5 redo of the entire litigation. It is not a place for an
6 objector to come in and go back through the entire
7 litigation record and revisit all the decisions that
8 were made and all the issues that arose.

9 The issue for this hearing is: Is the
10 settlement fair and adequate as measured against the
11 case at the time the settlement occurred and is there
12 evidence of fraud or collusion?

13 The materials relevant to that were filed
14 publicly.

15 So this notion or this statement that
16 everything is filed under seal is simply inaccurate.

17 Another inaccuracy that I want to call on
18 quickly before I turn to my main points is this notion
19 that there is a tactical decision by the parties to file
20 every single document under seal.

21 These cases have been going on a very long
22 time. As you know, Your Honor, there is a number of
23 them. They are all related and they involve a
24 stupendous amount of discovery and a stupendous amount
25 of extremely confidential information.

1 There are protective orders in this case and
2 all the related cases which Your Honor entered after due
3 consideration.

4 Filing all the materials that were filed
5 under those protective orders, as you may recall, Your
6 Honor, was a very burdensome process because the parties
7 initially were filing redacted copies of all the
8 hundreds of documents with all these hundreds of
9 thousands of cites in them, and the Court directed the
10 parties to file documents under seal presumptively as
11 opposed to going through the individual
12 document-by-document redaction process because of the
13 huge burden redaction would impose on the Court, the
14 parties and the nonparties.

15 So this argument that there is a tactically
16 decision by Class Counsel and Blue Cross's Counsel to
17 file things under seal simply is untrue.

18 The Department of Justice filed documents
19 under seal. Aetna filed documents under seal.
20 Nonparties responding to discovery filed things under
21 seal. All per the Court's instructions to alleviate the
22 burden.

23 And those instructions, Your Honor, were
24 appropriate because this case touched on critical
25 confidential financial strategic price and other cost

1 information of all the major insurance companies in
2 Michigan and dealing in Michigan, including national
3 insurers, all of the hospitals in Michigan and many
4 other entities none of whom benefitted and all of whom
5 would be hurt and the public would be hurt by the public
6 disclosure of that information. So those things were
7 appropriate.

8 Let me turn to a couple legal points in
9 response to unsealing and this will touch tangentially
10 on the notion of postponing this part of the hearing.

11 First, this request to unseal and intervene
12 is clearly untimely.

13 Counsel for the objectors didn't say
14 anything about the Sixth Circuit test.

15 As we explained in our brief, and this is at
16 docket number 178, pages 4 to 5 of our brief, there is a
17 test in the Sixth Circuit for whether an intervenor or
18 intervention on behalf of an objector is timely and they
19 didn't meet a single element of it.

20 Let me just highlight without replicating
21 all of that, let me highlight a couple of reasons why.

22 The objectors knew about this months ago.
23 In their objection, Exhibit 5 to their objection, this
24 is docket number 161, Exhibit 5, there is an email from
25 one of their clients specifically pointing out, and this

1 is a document they filed with the Court, that as of
2 September 22nd -- September 22nd -- and I will quote,
3 they, that is our Counsel, the Varnum Firm, will be
4 filing an objection on our behalf along with a dozen
5 other companies.

6 Part of the objections we have heard, the
7 burdensome process for filing the claim and so forth,
8 September 22nd, they were already planning their
9 objection. And yet, there is no attempt, no attempt to
10 reach out to the settlement administrator, to Blue
11 Cross, to Class Counsel or to the Court to obtain any of
12 the information that the objectors suddenly decided
13 under the very deadline they were objecting is critical.
14 That is too late.

15 And let me add this. The protective order,
16 Your Honor, has a procedure in it whereby anyone who
17 chooses to can request relief from the order.

18 That procedure could have been invoked at
19 any time. The protective order is not confidential.
20 It's not filed under seal.

21 There is absolutely no reason why the
22 objectors could not have done months ago what they have
23 belatedly attempted to do now.

24 Now, as the cases we cited point out, Your
25 Honor, objections, interventions, attempts to open

1 discovery that are tardy and that jeopardize the ability
2 to complete the fairness hearing in a timely fashion are
3 routinely overruled. They are not permitted. That
4 should be the result here.

5 Let me turn to my second point. The
6 information that the objectors seek is unnecessary. It
7 is irrelevant to the issue before the Court.

8 This comes back, Your Honor, to the point I
9 made at the beginning about what is it that's public and
10 what is it that they're trying to get.

11 The test, Your Honor, for the sufficiency of
12 information to prove the settlement is whether the Court
13 has before it sufficient information to evaluate
14 fairness.

15 And I will cite, we cite a number of cases,
16 Your Honor, in our briefs, Plaintiff cites a number of
17 cases on this, but I will just cite the In Re General
18 Tire and Rubber case, 726 F.2d 1075 at page 1084, note 6
19 from the Sixth Circuit, 1984, and what it points out is
20 the focus is not on the information available to the
21 objectors, the focus is on the information available to
22 the Court.

23 The Court has more than enough information I
24 suspect that the Court would ever want and certainly
25 more than the Court would need to evaluate the fairness

1 of the settlement after these years of litigation and
2 the enormous discovery record this case has entailed.

3 Additionally, Your Honor, the objectors have
4 all the information that class members normally get.
5 There are lots of antitrust class action settlements.
6 In virtually every one of those cases, most of the
7 records are drastically redacted or filed under seal for
8 the reasons they're redacted or filed under seal in this
9 case, because by their nature antitrust cases probe into
10 the innermost thinking of companies, about how they
11 conduct their businesses.

12 Objector discovery for that reason, Your
13 Honor, is normally limited to the settlement, not going
14 back and revisiting the entire discovery record of the
15 case.

16 And here, the preliminary approval papers
17 are not filed under seal, they are public.

18 The objectors' proper role to the extent
19 they have one is to evaluate the settlement as against
20 the litigation outcome at the time the settlement
21 occurred.

22 The question, frankly, Your Honor, is a
23 pretty simple one: Is 29 point 9 million dollars a
24 reasonable recovery out of an absolute outside dollar
25 limit of 118 million? Is that fair and reasonable?

1 We think the answer to that is clearly yes,
2 but Plaintiff's Counsel can say more about that.

3 And then the second question is simply is
4 there evidence of fraud or collusion. And frankly, Your
5 Honor, you know the history of this case. There is not
6 the slightest chance of fraud or collusion between class
7 Plaintiffs and Blue Cross Counsel. We have fought these
8 cases tooth and nail from day one and continue to do so.

9 The purpose for the objecting is not to
10 relitigate the case, it's not to second-guess class
11 counsel's judgment, and more specifically, as the Sixth
12 Circuit says in the Geyer versus Alexander case, 801 F.2
13 799 at page 809, I will offer a quote again, and they
14 quote at the end, the objectors don't get to, and then
15 the quote from the Sixth Circuit, replace counsel for
16 the class and start the case anew, closed quote.

17 That is not what this is about. They have the
18 information they need. Their request for more is
19 unnecessary.

20 And then third, I have said probably enough
21 on this but I want to emphasize it, sealing the records
22 here was appropriate. This room is full of Counsel for
23 the third parties who produced confidential information
24 in reliance on protective orders entered in multiple
25 cases, this and its companion cases, guarding their

1 innermost strategic decisions and secrets from public
2 disclosure to their customers, to their competitors, to
3 their suppliers, to everyone else with whom they did
4 business. And so too for Blue Cross.

5 There is no reason why any portion of that
6 should now be overruled at this belated date for no
7 proper purpose.

8 THE COURT: Thank you.

9 MR. SMALL: Thank you. Daniel Small for the
10 Class Plaintiffs.

11 Really two brief points. Mr. Hoffman, I
12 think, covered the important points, but I want to add
13 that Mr. Hoffman is absolutely correct that the role of
14 the objectors at a fairness hearing is limited. It is
15 not an effort to redo the litigation that we have all
16 worked so hard on for years.

17 And one of the reasons, Your Honor, that the
18 role of an objector is limited at a fairness hearing is
19 because the class is represented by Class Counsel, who
20 in this case, Your Honor, have been appointed twice by
21 the Court as adequate Counsel to represent the class;
22 once early in the litigation as interim co-lead counsel
23 and again when the Court certified the settlement class
24 here.

25 The Court has determined that Class Counsel

1 are adequate to represent the case, and that is true,
2 Your Honor, I would submit in spades in this case where
3 we have spent three years engaging in a tremendous
4 amount of discovery, investing 3.5 million dollars
5 out-of-pocket and over 15 million dollars in our time to
6 develop this case.

7 We looked at damages very hard with an
8 expert who we paid over two and a half million dollars
9 to look at the damages issue.

10 The Class Counsel, Your Honor, are attorneys
11 who have worked on precisely this type of litigation for
12 years spanning 25, 30 year careers doing exactly this.

13 And Your Honor, I believe given that effort,
14 and given the total lack of any evidence to support the
15 assertion that this settlement is collusive, that the
16 Court has plenty of information in the record in which
17 to determine whether this settlement is fair, reasonable
18 and adequate.

19 The only other point I would make, Your
20 Honor, is that there are many large sophisticated
21 entities in this Class. If it were the case that there
22 was not a sufficient basis upon which to evaluate this
23 settlement, where are all these large companies? None
24 of them have objected, Your Honor. None of them are
25 demanding access to further records. Many of them are

1 filing claims to participate in this settlement.

2 This is not an issue that has been of
3 concern to any of the many very large members of the
4 Class who are very sophisticated and have access to
5 outside counsel, in many cases in-house Counsel, and
6 have a strong basis on which to evaluate the settlement.
7 Thank you.

8 THE COURT: Let's go next to the fairness
9 hearing.

10 I would allow you a time to reply but you
11 exceeded your time on your motion to intervene.

12 Now I'm going to start with the objectors,
13 then you can respond to everybody.

14 So I have Mr. Andrews who wants five
15 minutes; is that right?

16 MR. ANDREWS: But I would like Plaintiff's
17 Counsel to go first.

18 THE COURT: I would normally do that, but if
19 I let them go first, they're going to make their
20 presentation about why they should prevail and then
21 they're going to want to respond to your objections. So
22 I know that is not the normal order, Mr. Andrews, but I
23 would like you to go first so that when they make their
24 presentation, they can include in their presentation
25 their objections. And while I don't expect that you

1 will raise anything new, you might cast a different
2 light on our reading of the papers that you have
3 presented to the Court which are numerous you would
4 agree, right?

5 MR. ANDREWS: I would say yes based on what
6 I felt wrong.

7 THE COURT: Yes, and that is fine, but I'm
8 just saying that if I am going to let them make their
9 presentation and they don't respond to not one
10 objection, they're going to want time to do that.

11 So if you don't mind, I think under the
12 court rules I have the right to say how the proceedings
13 will proceed and have a lot of discretion in that
14 regard. So I would ask you to go first.

15 MR. ANDREWS: Yes, Judge.

16 THE COURT: Okay. Thank you.

17 MR. ANDREWS: My name is Chris Andrews, pro
18 se objector and I'm not an attorney.

19 I'm going to keep my comments to five
20 minutes.

21 Let's start, we're going to go down this
22 really quick.

23 Mr. Hoffman brought up a point, one really
24 good point that this fairness hearing is basically not a
25 redo. That is a 100 percent accurate.

1 Based on all the documents we submitted,
2 there is no way in the world this fairness hearing
3 should conclude that the settlement is fair and
4 reasonable and adequate, absolutely no way.

5 We don't have the ability to rewrite the
6 settlement. At this stage. No one does. You have to
7 give it a thumbs up or thumbs down.

8 Right now, I see thumbs down unless it is a
9 reality show, but that is not going to happen.

10 A couple of things I would like to point
11 out. They keep bringing up the fact that the 29 million
12 dollars, 30 million dollars is fair and reasonable.

13 We have not seen any evidence in all this
14 paperwork justifying the 118 million dollars.

15 We would also like to be included, if the
16 Court unseals some of the records, we would like to see
17 the records that apply proving on paper in writing that
18 there is 118 million dollars worth of damages.

19 No one has seen it. Maybe you have seen it,
20 I haven't seen it. But someone outside the Court and
21 the parties should be able to look at it, because we
22 might find there is something wrong just like we found
23 what was wrong in the whole settlement which was
24 everything.

25 So we would like to be included in those

1 eyes-only, and you have to make an exception. I am not
2 an attorney but I will sign a protective order.

3 Assuming that 118 million dollars was
4 legitimate, we have a proposal to make and maybe the
5 Plaintiff's Counsel can be given a 10 minute recess to
6 talk it over.

7 Here is what we would like to do. Assuming
8 the 118 million is legitimate, and we haven't seen proof
9 of that. One, obviously we have to see the evidence.
10 Number two, we pointed out over 18 different material
11 errors in the settlement hearing that encompassed 290
12 pages. It is not made up of all verifiable, it is all
13 in writing. It is there, I'm not going to repeat it.
14 It would take four hours of reading to do it.

15 We have made suggestions to rewrite the
16 whole settlement. We put together the presentation
17 what it should have been written and what should have
18 been done. The issue is it should have been done by
19 these people. It hasn't been done.

20 They're coming in here wanting -- it is
21 mind boggling.

22 We're looking for Counsel to add additional
23 information to the wrong notice. We also want the wrong
24 notice to be remailed to every person that's a class
25 member who has not sent in a claim.

1 At this point, there is three million
2 Michiganders who have been supposedly overcharged on
3 medical services. That includes everybody in this room
4 who is from Michigan.

5 Right now, there is a rate of two percent,
6 25,000 people have filed claims out of three million.
7 That is a failure in the notice.

8 In fact, when you go back and read through
9 one of the class members who commented on Facebook this
10 week, 1100 members who said we think it is a joke,
11 talked about the fact when you call the administrator,
12 they were told they had to file one form for each child.
13 So out of those 25,000 claims that have been filed, they
14 could represent 8,000 households and there's three
15 people in each household. That is 25,000 right there.
16 So it is a failure.

17 The Court should not be able to approve this
18 based on how bad the notice that went out to the
19 classes. Those notices should be remailed out.

20 A second opt-out period also should be
21 included in that bail out. If we somehow come up with
22 the 118 million dollars worth of damages as evidence,
23 those opt-outs can then go to small claims court or
24 district court. At this point, no one can do anything.
25 We're all hamstrung here.

1 Next, the non-effective information on the
2 Web site which includes the claim forms obviously needs
3 to be replaced.

4 We don't think the 30 million dollars is
5 sufficient. The 30 million dollars represents 25
6 percent of 120 million dollars. The attorneys have
7 falsely claimed they have incurred 15 point five million
8 dollars in fees. It would take 25 percent of 15 point 5
9 million. That is really the true lotus star in this
10 case.

11 Maybe we should just call it a day if the
12 118 is legitimate, if we know that is a fact. We would
13 like them to get 25 percent of what they want.

14 Why should we get 25 percent, we want 50
15 million. If it is more than 118 million dollars, uh-uh,
16 we want 50 percent of that amount over and above that.

17 Next, Mr. Hoffman -- well, Mr. Walters
18 brought up one particular point that hits home here.
19 They engaged in two weeks negotiations trying to get
20 redacted information so we could see it. We were also
21 stalled for two weeks by Class Counsel. They had us put
22 together a document under false pretenses that they then
23 disclosed in their final settlement papers to impeach
24 our credibility. They got on the call, they used
25 interstate phone lines, they crossed state lines in the

1 phone call having to use the computer to create
2 documents for their false pretenses and they're now
3 going to try to impeach us with it.

4 Judge, a lot of this stuff goes on you might
5 not see. It is trench warfare down here. You should
6 see what goes on. You've only seen part of it. It goes
7 on in almost every single class action case.

8 I would like to reserve one minute. I would
9 like to call Mr. Miller to the stand when all is said
10 and done and I have one question to ask him about that
11 secret phone call that turned out not to be secret.

12 Do you have any questions for me, Judge?

13 THE COURT: Maybe you should just say what
14 your question is going to be and they could address it.

15 MR. ANDREWS: Sure. I would like to ask him
16 one question. As I stated in the supplement, I was the
17 only speaker on our end. I did not say whether or not
18 there was any other speakers on the call or any other
19 listeners on the call on my end.

20 I would like Mr. Miller to answer the
21 following question: Did he specifically, as the
22 chairman of Class Counsel, ask the question to me the
23 second time, do you want the contents of this call to
24 remain secret? I answered, yes. Did he ask that
25 question.

1 If he denies it, I will take a truth
2 detector test and come back. Okay, thanks.

3 THE COURT: I also received a letter from
4 John Kuntizer, document number 158, by way of objection.
5 And I received an objection by Scott Mancinelli who
6 indicated in his objection that he was not going to
7 appear, but I have noted it.

8 I received a letter from Darrell Thompson
9 and Margaret Schubert. And neither one of those people
10 are here, right?

11 You're here for -- are you Mr. Thompson?

12 MR. THOMPSON: Yes.

13 THE COURT: You know, I know there is an
14 issue about whether or not Mr. Thompson's objection is
15 timely, but I would like to give him two minutes to
16 speak anyway. Does anyone object to that?

17 MR. MILLER: No, Your Honor.

18 MR. HOFFMAN: No, Your Honor.

19 THE COURT: You may.

20 MR. THOMPSON: I'll try and shorten this.
21 My name is Darrell Thompson, I'm a Michigan senior
22 citizen and Blue Care Network Advantage member. I'm
23 going to skip over my first issue of a United States
24 Court of Appeals case of Hileck versus Blue Cross, but I
25 think that is a fiduciary responsibility issue.

1 The second issue I think is this case which
2 I think is a fiduciary responsibility issue. And
3 according to my understanding, the United States
4 Department of Labor health plans and benefits fiduciary
5 responsibilities, the primary responsibility of the
6 fiduciary is to run the plan solely for making
7 provisions for the beneficiaries.

8 Skipping to my third issue, Blue Care
9 Network is specifically health care fraud and its
10 elements. The do not report proper products. The
11 health care false claim act says that false means wholly
12 or partially untrue.

13 Does Blue Shield of Michigan have fiduciary
14 responsibility to enforce all health care laws? Is
15 there a conflict of interest? I believe enforcement of
16 partial untruths would result in a decrease in claims
17 and a decrease administrative compensation.

18 Fourth, in 9-11, many people died so the
19 response was to improve airport security. When credit
20 card is reported, a bank issues new credit cards. When
21 I called Blue Care Network to ask them what they do,
22 they said we just pay whatever your doctor says.

23 So 60 Minutes report 167 people died and
24 hundred more received unnecessary surgeries. A doctor
25 performs thousands of unnecessary surgeries. Detroit

1 Free Press article, September 17th, 2014, cancer doctor
2 hits scam giving patients unneeded chemo. FBI, U.S.
3 Attorney's Office, January 28, 2014, several doctors
4 working at the hospitals -- I repeat, several doctors
5 working at the hospitals performed numerous evasive
6 heart procedures on Medicare patients who did not need
7 them.

8 I'm a Blue Care Advantage member. Four
9 doctors informed to me before surgery I need to be
10 treated for three vessel coronary artery device despite
11 the fact my heart cath doesn't report I have three
12 vessel coronary arteries. Blue Care Network informed my
13 doctor that I need a flu shot or I'm scheduled for a
14 physical.

15 I think Blue Care Network has a fiduciary
16 managerial responsibility to have my primary care doctor
17 verify that I either have three vessels -- if they're
18 going to treat me for three vessel coronary disease,
19 have my primary doctor verify that my heart cath reports
20 I have three vessels coronary disease.

21 The other cases involve people being treated
22 for cancer. Have the primary care doctor check the test
23 results of these people to make sure that they actually
24 have cancer before you get treated.

25 So my suggestion, my conclusion here --

1 well, Blue Care Network, how we fight fraud. I would
2 like the chance to show how do you proactively fight
3 fraud and reactive strategy to fight fraud. People
4 should be safe from having their chest sternum bone cut
5 out to treat significant significant blocked arteries
6 they do not have. People should be safe from being sick
7 or having their hair fall out from chemotherapy due to
8 cancer they don't have. People should be safe from
9 dying from unclear medical procedures.

10 Speaking on behalf of future patients, I'm
11 requesting to include the comments by objectors, to
12 include the law enforcement and implement effective
13 health care laws strategies.

14 Speaking on behalf of the dead and the
15 living suffering victims of medically suffering I am
16 requesting information be given to the patients become
17 part of dead.

18 THE COURT: Mr. Walters, we're back to you.

19 MR. WALTERS: Your Honor, my clients object
20 to the proposed settlement for five reasons.

21 First, the amount of the proposed settlement
22 is completely inadequate and that is where I will spend
23 most of my time.

24 Second, the settlement gives preferential
25 treatment to the named Plaintiffs in terms of the

1 incentive rewards that are proposed.

2 Third, the proposed settlement gives
3 preferential treatment to Plaintiff's Counsel in terms
4 of the amount of money proposed to be paid to Counsel as
5 a percentage of the overall settlement fund.

6 Fourth, the claims process is unnecessarily
7 burdensome particularly with regards to the millions of
8 class members whose health care is managed by Blue
9 Cross. Those people should not have to file a claim at
10 all.

11 And finally, fifth, the documents necessary
12 to wholly assess the proposed settlement are under seal.
13 I won't rehash those arguments, but it is one reason why
14 the proposed settlement is unfair and cannot be fully
15 evaluated at this point in time.

16 Turning to the first and primary point.
17 The amount of the proposed settlement here is completely
18 inadequate.

19 Hospital care is massive business in
20 Michigan. And everywhere. It is estimated that over
21 seven million class members paid Michigan hospitals over
22 85 billion -- with a B -- dollars since 2006. That is
23 the time period that this proposed settlement would
24 reach back to is 2006.

25 These calculations that were laid out in our

1 objections, that have not been reputed or challenged in
2 any way, are based on publicly available data.

3 This would be an average for each class
4 member, the average class member has spent \$12,000 on
5 hospital care since 2006. Over the last eight years.

6 Of course some class members have spent
7 millions to their insurance companies and self-insured
8 plans and some individuals have spent little. But if
9 you average it out over the whole class, the average
10 class member has spent \$12,000 on hospital care since
11 2006.

12 Now, the allegations in the Complaint are
13 that Blue Cross, as part of these most favored nation
14 agreements, agreed they would pay an average of a 16
15 percent higher reimbursement rate if the hospital agreed
16 to an MFN agreement versus if the hospital would not
17 accept a most favored nation agreement. Essentially
18 agreeing to a price fixing scheme to increase hospital
19 costs for everyone in Michigan. That is the underlying
20 allegations of the Complaint.

21 The city of Pontiac case even alleged higher
22 percentages. I believe it was between 23 and 39 percent
23 were the allegations in that Complaint.

24 If the allegations are true that Plaintiffs
25 have made and that they're able to prove those

1 allegations at trial, these most favored nation
2 agreements caused billions of dollars in damages to
3 class members since 2006. Billions.

4 Moreover, this is an antitrust case.
5 Damages are automatically trebled under federal
6 antitrust law if the Plaintiffs are successful here.
7 Plus, the federal antitrust law entitles those
8 plaintiffs' their attorneys fees if they win.

9 Aetna, in one of the opt-out cases, is
10 alleging two billion dollars worth of damages to it by
11 itself.

12 This is a bet-the-company type of a case for
13 Blue Cross. It is no wonder that they're eager to push
14 this settlement through.

15 Now, in the notice for the proposed
16 settlement agreement, it provides that class members who
17 submit claims would be paid up to one percent of their
18 hospital expenditures at most hospitals for the Category
19 II hospitals. For the Category I hospitals, they could
20 be reimbursed up to three and a half percent of their
21 hospital expenditures.

22 That sounds like a fair settlement on its
23 face. The Complaint alleges 16 percent overcharges on
24 average, we'll settle for reimbursement of between one
25 to three and a half percent given its litigation risks,

1 the costs of going forward. That on its face sounds
2 like a reasonable settlement.

3 The problem is when you do the math because
4 reimbursement of even one percent of the class members'
5 hospital expenditures since 2006 would require 850
6 million dollars to be set aside in the settlement. That
7 is one percent of the 85 billion that has been spent by
8 class members since 2006.

9 The actual settlement fund that is in the
10 proposal is just under 30 million dollars, but the net
11 is really what matters to the class members.

12 Once you deduct attorneys fees, once you
13 deduct costs, once you deduct class administration
14 expenses, and the net, if this Court were to award
15 attorneys fees to the level that is being sought by
16 Plaintiff's Counsel and to which is not being objected
17 to by Blue Cross, the net would be closer to 15 million
18 dollars in terms of what would be disbursed to the seven
19 million class members here in terms of the potential
20 claims in this case.

21 Fifteen million dollars spread over seven
22 million potential class members, an average net recovery
23 to potential class members of about \$2.00 a piece.

24 Keep in mind, Your Honor, the average class
25 member has spent \$12,000 on hospital expenses since 2006

1 and they're going to recover an average of \$2.00 under
2 the proposed settlement.

3 Your Honor, it is not a reasonable
4 settlement.

5 Put another way, the class members would be
6 reimbursed a dollar for every \$5,681.00 they spent at a
7 Michigan hospital since 2006.

8 It is a nuisance value settlement, Your
9 Honor. Thirty million dollars sounds like a lot, but
10 when you break it down over 70 million potential class
11 members, it is a nuisance value. And the only way it
12 makes sense, the only way it is fair is if this Court
13 has already essentially decided that it is nearly
14 certain that the case is going to get kicked on summary
15 judgment, on Daubert motions, kicking a damage expert
16 and not allowing the Plaintiffs to try to put in a new
17 expert. That is the only way this settlement makes
18 sense. Because you could say, well, a \$2.00 average
19 recovering the seven million class members is better
20 than zero. That is the only why this makes sense, Your
21 Honor. Otherwise, the interest of the class members is
22 clearly put forward with the case.

23 Now, there haven't been a lot of opt-outs,
24 but there have been some very notable ones.

25 Aetna has opted-out and is seeking two

1 billion dollars worth of damages on its own. Health
2 Alliance Plan, the other largest competitor to Blue
3 Cross, has also opted-out and is pursuing its own claim.

4 Now, the incentive of the class is to go
5 forward with the lawsuit and the incentive of Plaintiffs
6 and its Counsel are not in alignment and I will you get
7 to that in just a minute.

8 So in order to assess the settlement, we
9 have to look at what is the likelihood of success of the
10 claim, because the settlement only makes sense if the
11 Court concludes that the settlement has no likelihood of
12 success.

13 Well, what do we know in the public record?
14 We know the Department of Justice thought enough of this
15 claim to bring its own complaint against Blue Cross
16 after more than a year of investigation and over 75
17 witness interviews.

18 We know that the Michigan legislature was
19 concerned enough about the anticompetitive effect of
20 this practice to ban MFN agreements by passing
21 legislation to do so.

22 We know that no court has granted summary
23 judgment in favor of Blue Cross in any of these cases;
24 in the DOJ case, the Aetna case or in this case. In
25 fact, there isn't even a summary judgment motion on file

1 before the Court currently in this case, at least the
2 way that I saw the docket.

3 The city of Pontiac case is the only one
4 that was dismissed and that was only because the
5 Plaintiff in that case insisted on pleading it as a per
6 se violation rather than a rules reason. So it was a
7 legal issue.

8 We also know that there was no class
9 certification motion to file in this case other than to
10 approve the settlement class.

11 So when Blue Cross says, oh, this class has
12 never been certified as it went forward, we don't know
13 that, we haven't had any motion practice with regard to
14 that.

15 And then what else do we know about
16 likelihood of success besides all these things? Well,
17 the objectors know nothing, but apparently in the black
18 box of documents filed under seal, there is all kinds of
19 information that was submitted to the Court with regard
20 to the request that the Court certify the settlement
21 class that relates to the likelihood of success on the
22 merits, the proposed damages, because of course, the
23 parties had to get this Court to certify the settlement
24 class. It filed the documents under seal to do so. And
25 there are apparently documents in there that might

1 relate to that. We have been able to glean only a tiny
2 bit out of that.

3 We know that there is sealed expert damages
4 report that is the basis of the settlement. It is a 120
5 million dollar report. We haven't been able to look at
6 it, but what we do know about it is it only analyzes
7 damages at 13 of the 130 hospitals in the state.

8 That report does not include any damages for
9 the other 117 hospitals in the state. So it is not at
10 all conclusive.

11 The second thing that we know from Blue
12 Cross's brief is that class certification expert
13 discovery is still open and that merit expert discovery
14 hasn't even started.

15 This expert report deals with class
16 certification issues. The merits, the final damages
17 that would be proved on a merits case at trial, the
18 expert discovery on that hasn't even started yet, Your
19 Honor.

20 The damages analysis in this case is not
21 final, it is not even close to final.

22 Dr. Leitzinger was preparing a report for
23 class recertification purposes, not for merit purposes.

24 Under those circumstances, we can't say with
25 any difinity that 118 million dollars is the ceiling of

1 the potential discovery in this case.

2 And even if it was, it is still subject to
3 treble damages under federal antitrust law.

4 So if we're looking at this as a 118 million
5 maximum recovery, it's disingenuous. Even under Dr.
6 Leitzinger's analysis, the maximum recovery is actually
7 over 350 million dollars, Your Honor.

8 The claims rate, the take rate in this case
9 tells you all you need to know about this settlement.
10 It is not even worth people's time to bother filing a
11 claim.

12 As of October 23rd, three months after class
13 notices were sent out, there have been less than \$25,000
14 people who have filed claims out of the seven million
15 potential class members. That tells you all you need to
16 know about this claim.

17 Last minute, Your Honor, relating to the
18 burdensomeness on the class process. I want to talk on
19 that very briefly.

20 There is no reason why for Blue Cross
21 members, for people whose claims are managed by Blue
22 Cross, whose health care is managed by Blue Cross, why
23 those people should have to file a claim at all.
24 Because what is happening, for example, in our objection
25 we mention Petoskey Plastics. Petoskey Plastics is one

1 of our clients. They have spent hours and hours dealing
2 with Blue Cross trying to get the data necessary to file
3 a claim. And so they finally got the data from Blue
4 Cross after spending a total of about six hours fighting
5 over getting that, and then they submit that data to the
6 class administrator. All Petoskey Plastics is doing is
7 being the middleman, taking Blue Cross's data and
8 submitting it to the claims administrator.

9 For the millions of class members of health
10 care advantage being managed by Blue Cross, there is no
11 reason whatsoever that they should be filing a claim.
12 Those claims should be flowing directly through Blue
13 Cross in this case.

14 Your Honor, proposed settlement should be
15 rejected for five reasons. Most importantly, it is way
16 too small, preferential treatment to the named
17 Plaintiffs. They get thousands of dollars in incentive
18 payments when the average class member gets \$2.00 a
19 piece. Unduly preference to Plaintiff's Counsel in
20 terms of the amount that is paid to Plaintiff's Counsel.
21 They have no objection to a 10 million dollar field work
22 to the Plaintiff's Counsel in this case if they had
23 secured an appropriate settlement amount. But they did
24 not.

25 The claims process is unduly burdensome and

1 not necessary for Blue Cross customers. And the
2 substantive documents that are relied upon by the
3 parties have not been subjected to sufficient public
4 scrutiny. Thank you.

5 THE COURT: You do need to include your
6 argument on attorneys fees.

7 MR. MILLER: To put the objections in
8 context, what we're talking about is less than point
9 zero zero zero zero one zero 67 percent of the Class.
10 About 32 out of more than three million and virtually
11 all of those 32 are conflicted.

12 The Varnum objection is conflicted. The
13 Varnum objections do not even disclose in their papers
14 that they had an interest different from other class
15 members.

16 Twenty five of 26 of those objectors are
17 embroiled in different litigation, contentious and
18 protracted litigation against Blue Cross regarding
19 allegedly misrepresented fees.

20 Crain's recently reported that Varnum has
21 brought this fee litigation 50 times. It is being hotly
22 litigated between Varnum and Mr. Horton in trials, in
23 Michigan Court of Appeals, Sixth Circuit and U.S.
24 Supreme Court.

25 They have a different interest than the

1 Class. Their interest is leverage against Blue Cross
2 and we are caught in the middle.

3 In contrast, Your Honor, more than 30,000
4 people have already made claims. That is a lot in a
5 case like this when put in context. Because the heart
6 of these cases, Category I, where 78 percent of the
7 damages are and the money is allocated -- excuse me,
8 where the money is allocated. Lots of people are in
9 Category III, but those are very weak claims and we
10 agreed to a broad release and we made it a broad Class.
11 But those are where the claims are weakest.

12 There are 122 sophisticated insurers and
13 self-insured entities that have made claims with active
14 in-house Counsel, outside Counsel and experts. That
15 should be entitled to great weight.

16 In order to offset the settlement, they
17 really have to prove fraud or collusion. Those
18 allegations are offensive.

19 We have 18 firms and 118 Plaintiff attorneys
20 that worked on this case. It is implausible that we did
21 anything like that. Never have, never would.

22 Those are scurrilous words that shouldn't even be
23 put on a piece of paper, but they have no evidence
24 whatsoever to support it. And without that, Your Honor,
25 they have no basis to second-guess the judgment of Class

1 Counsel.

2 We had no conflicts. We had every incentive
3 to maximize the recovery.

4 If this was really a multibillion case, we
5 never would have settled it for about 30 million.

6 I just settled a case against AIG for 971
7 million because it was a big case.

8 We're not going to leave real money on the
9 table, we use our judgment about what was the best we
10 could get for this Class.

11 If they really believed it was a
12 multibillion dollar settlement, they never would have
13 opted out, and they would have -- excuse me, they would
14 have opted-out, not objected, and they would have
15 brought their own case.

16 This is nowhere near a multibillion dollar
17 case.

18 We investigated two and a half million
19 dollars in the expert Dr. Leitzinger. We wanted him to
20 have the highest credible number he could. That was 118
21 million dollars.

22 To stretch that into a multibillion dollar
23 case would have killed this case. We would have lost
24 it. That is the worst thing you could ever do as a
25 plaintiff.

1 They wildly exaggerate the likelihood of
2 success. The Government stopped litigating. The
3 Government didn't have the major obstacles we do: Class
4 certs, causation between MFN clauses and overcharges and
5 winning the case.

6 He talks about treble damages, but we have
7 cited uncontradicted cases in our brief that you don't
8 consider treble damages in evaluating settlements.

9 As to the amount of attorneys fees and
10 expenses, that is right in the heart of the claim. What
11 we asked for is well within Sixth Circuit precedence.
12 And the expenses that we paid had to be paid.

13 We didn't delight in paying 2.5 million
14 dollars at risk and incurring two and a half million
15 dollars for an expert, we should get credit for that.
16 That was evidence of our commitment to the case.

17 And to compare our aggregate attorney fee
18 request to what an individual Class member will receive
19 with the smallest claims is nonsense. It is apples to
20 oranges.

21 Our fee request is in the aggregate as a
22 percentage of the aggregate recovery, and we will
23 demonstrate on our fees in a brief that our fee request
24 of a third is right down the heart of the plain for
25 cases of this type in this District and in this Court.

1 He says Aetna opted out. No, it didn't, it
2 brought its own case from day one. HAP did opt out but
3 that was wonderful news because one of the great
4 features of the settlement is there is no reduction for
5 opt-outs and HAP was one of the largest Class members.
6 So that increased the value of the settlement for Class
7 members quite frankly at least 20 percent, maybe more.

8 There is no dispute that this case is
9 complex, that we did a lot in discovery. The likelihood
10 of success, we obtained 25 percent of the Class members
11 for damages when the standard for antitrust is 5.35
12 percent to 28 percent. That is excellent. Especially
13 since we faced class certification fight, a 23(f) fight,
14 a Daubert challenge and defeating the inevitable Rule 56
15 opinion.

16 As it relates to Mr. Andrews, Mr. Andrews'
17 objection reveals itself as malicious. All you have to
18 do is see what he has written. Its mudslinging, it is
19 bullying. He is upset because we wouldn't pay him
20 \$153,000. We wouldn't pay him because he didn't bring
21 any benefit to the Class. And we followed the rules
22 that you don't share attorney fees with non-lawyers and
23 we will never break that rule.

24 There is no dispute that even though he
25 calls this the worst settlement ever, he was willing to

1 give up all the objections to the settlement if we
2 reduced our request for fees by 990,000 and paid him
3 153,000 for 50.

4 He says we abused confidentiality.
5 Absolutely false. There was no attorney/client
6 privilege once he announced his intention to object.

7 We had one telephone call with him, led by
8 Mr. Gustafson, who did a great job, and he said in the
9 call that this is a four-way call. Because he is not a
10 lawyer, I pinned him to explain what that means and to
11 make clear it is only what is in that call, nothing
12 before, nothing after.

13 And we didn't use anything in that call in
14 any of our submissions.

15 While he filed hundreds of pages, you only
16 need to look at one e-mail, Your Honor, and that is what
17 he sent to me on September 22nd, 2014, which is docket
18 169-16. And it says, quote:

19 "No call means no I guess. After reviewing
20 the 380 pages in this objection it will be
21 posted to describe in an email news release
22 sent out to 125 news organizations,
23 congressional committees, public interest
24 groups directing them to this objection. I
25 will also send a letter to all judges in

1 this District referring them to this
2 objection so everyone will be able to see
3 what a poster child of abuse this entire
4 settlement is so no other class members will
5 be victimized in future class action
6 settlements.

7 "The goal is to get Plaintiff's Counsel
8 dismissed as we already know. The demands
9 have now changed and have substantially
10 increased. This won't be a slam dunk like
11 it was for your last two settlements in the
12 Detroit Federal Court. Bar complaints will
13 also be filed. You can also include this
14 for the Judge to see with all the other
15 e-mails sent your way".

16 This type of malice and bullying has no
17 place in this process whatsoever.

18 He is a serial objector. He is in the
19 business of objecting. He wants to make money. And he
20 is conflicted.

21 And that is the fundamental problem with
22 both of these objections. They are conflicted and
23 they're going to do damage if successful to 30,000
24 people who have made claims. Sophisticated
25 organizations who have made claims.

1 And if they didn't like the settlement, that
2 is something that Your Honor should give some weight to.
3 Because they're sophisticated and they have no conflict
4 of interest.

5 As to notice and administration, we laid it
6 out in our brief. Dr. Wheatman and attorney Charles
7 Marr gave a very detailed affidavit as to the adequacy
8 of our notice.

9 Certainly we should not engage in trial by
10 Facebook. The fact that a thousand or so people posted
11 nasty comments on Facebook is not to be surprised. In
12 fact, Dr. Wheatman talks about a significant percentage
13 of people don't like short notice, but they're better
14 than the long notice. More people look at them. And in
15 the aggregate, we have reached 82.9 percent of adults in
16 Michigan, on average, two point times per person. A
17 hundred thousand people visited the Web site. There
18 were 200,000 minutes of calls with a live operator
19 trained to respond.

20 We can't do anything about apathy, Your
21 Honor, but we're proud that we got 30,000 people to
22 actually make claims.

23 And, the money is real money that is going
24 to get distributed to Class Members. Some of them will
25 get six-figure recovery. The people who get very little

1 are mostly those who had very doubtful claims that are
2 only included within the settlement because Blue Cross
3 understands we wanted final peace. But better they get
4 something than nothing.

5 But the people who were really damaged, who
6 are identified by Dr. Leitzinger as damaged, get very
7 significant recovery shares.

8 We're proud of this settlement, Your Honor,
9 and believe you should approve it.

10 THE COURT: Mr. Small.

11 MR. SMALL: Thank you, Your Honor. I'm
12 going to try to not be repetitive in anything Mr. Miller
13 said, but there are some important points to be made
14 here, Your Honor, and let me start by saying you've
15 heard a lot of numbers today, but really, three numbers
16 stand out from all of the others as critical to the
17 Court's consideration of this settlement.

18 The first number, of course, is the amount
19 of the settlement, 30 million dollars.

20 The second number which you've heard is the
21 118 million dollars that Dr. Leitzinger estimated
22 through very detailed analysis is the damages that could
23 be proved of the Class in this case.

24 And the third number, Your Honor, is 25
25 percent.

1 This settlement, Your Honor, 30 million
2 dollars, is 25 percent of the provable damages in this
3 case. That right there puts this easily in the
4 mainstream of approved settlements.

5 We cited several cases, Your Honor,
6 including the Stop and Shop in which the Court held that
7 the 11.4 percent recovery compares favorably with
8 settlements reached in other complex class action
9 lawsuits.

10 And we cited the Liner Board, Your Honor,
11 where the Court surveyed what settlements had been
12 approved in antitrust class actions and found that the
13 range was 5.35 percent of damages up to about 28 percent
14 of damages.

15 So Your Honor, we're not only comfortably
16 within that range, but we're on the high end.

17 Now, there is a presumption that a
18 settlement should be approved if it doesn't have any
19 indicia of fraud or collusion. Of course, that
20 allegation has been made, but it has not been backed up.

21 We spent, Your Honor, well over a year,
22 about a year and a half, in on and off settlement
23 negotiations with Blue Cross. And what was notable
24 about them, in addition to their being hard fought and
25 contentious, was that they broke off twice for a period

1 of months. The parties were absolutely willing to walk
2 away from settlement if they couldn't get a deal that
3 they thought was reasonable. And it happened twice for
4 months.

5 There are no separate deals in this
6 settlement. We have heard about incentive awards, we've
7 heard about expenses. Your Honor, the settlement
8 provides for none of those. There is absolutely no
9 guarantee, no provision in the settlement for fees,
10 expenses or incentive awards. All of those are left to
11 the Court's discretion. The Court is absolutely free to
12 determine what a reasonable attorney fee is, what a
13 reasonable disbursement of expenses is, and what
14 reasonable incentive awards are. And whatever the Court
15 determines on that will not affect the settlement. The
16 settlement goes forward whatever the Court rules on
17 those issues.

18 And I will say that far from Class Counsel
19 profiting from this case in some way that should give
20 the Court concern, the fee that we're asking for, if the
21 Court awards what we're asking for, we view that a
22 negative multiplier, less than the value of our time
23 that we put into the case.

24 And finally, Your Honor, on the issue of
25 whether there is any fraud or collusion here, Your

1 Honor, I can say certainly for myself, for my firm, for
2 my Co-Counsel, we have never engaged in a fraudulent
3 settlement and never will. We care too much about the
4 job that we do. We take it seriously and we care about
5 our reputation, Your Honor. We would never engage in a
6 fraudulent settlement.

7 Now, there is only one estimate, Your Honor,
8 in the Class's damages and that was done by Dr.
9 Leitzinger. No one else has done an estimate. There is
10 no competing estimate out there that would somehow
11 undercut what Dr. Leitzinger has done.

12 Dr. Leitzinger is a Ph.D. economist who has
13 had a long and distinguished career over 33 years. He
14 has testified for Plaintiffs, he has testified for
15 Defendants, he has testified for major companies and
16 Government entities. He has testified at depositions,
17 in hearings and trials repeatedly throughout his career.
18 He is one of the more experienced and accomplished
19 economists who has evolved in estimating class damages.

20 And that estimate that he prepared, Your
21 Honor, was not done for this settlement, as seems like
22 was suggested, it was done for litigation purposes, Your
23 Honor. It was done in support of our motion for class
24 certification at a time when we absolutely had the
25 incentive to prove the maximum damages we could prove.

1 We had every reason to do that on behalf of
2 the Class and on behalf of Class Counsel.

3 And Dr. Leitzinger, Your Honor, did over two
4 and a half million dollars worth of work mostly on
5 impact and damages issues. He analyzed parabytes of
6 data. He did serious analysis involving differences and
7 differences in regression analysis. He produced a 61
8 page expert report with exhibits.

9 That issue of damages was fully and
10 carefully explored by Dr. Leitzinger, and no one else in
11 this case has done it.

12 And so, Your Honor, you may ask if there are
13 billions and billions of dollars of health care
14 purchases involved in this case, why are damages only
15 118 million dollars? The most important answer to that
16 question, Your Honor, is that is what the data said.

17 Of course, we would have loved it if the
18 data had produced many, many more millions of dollars
19 worth of damages, but the data, our data, and careful
20 analysis showed 118 million dollars.

21 And it is not implausible at all, Your
22 Honor, when you look at what the underlying conduct was
23 by Blue Cross that was challenged in the case. It is an
24 MFN scheme in which Blue Cross was, in many instances,
25 setting a floor on the discount advantage that it would

1 retain against its competitors over time so that some
2 day in the future it would not find itself losing that
3 discount advantage.

4 And it happened to be the case, Your Honor,
5 for many of the hospitals that the rainy day that Blue
6 Cross worried about didn't come by the time the damages
7 period ended. So in fact, we were not able to measure
8 damages at many of the hospitals that have MFN
9 provisions.

10 And to really get to a final important
11 point, Your Honor, which is the standard for approval,
12 which I think is an appropriate note to end on here, of
13 course the general standard, Your Honor, is the
14 settlement must be fair, reasonable and adequate to be
15 approved. And we think it clearly is here.

16 But Your Honor, in another case that I know
17 you're familiar with, IUE-CWA versus General Motors
18 Corporation, the Court said, quote, the Court must
19 determine whether the settlement falls within this range
20 of reasonableness and not whether it is the most
21 favorable possible result in the litigation.

22 That is a very important point, Your Honor.
23 It's not whether this is exactly the result that is
24 perfection, the absolute best that could be done, it is
25 a question of whether this is in the range of

1 reasonableness. And it clearly is.

2 Your Honor should also take note that there
3 is a federal policy favoring the settling of class
4 actions which Your Honor noted in the IUE-CWA case that
5 I just mentioned.

6 And finally, Your Honor, similarly, there is
7 a strong presumption in favor of voluntary settlements
8 which is especially strong in class action cases. And
9 that is the Kinder versus Northwest Bank case, 213 West
10 Law 1914519 at 3, a Western District of Michigan, April
11 15th, 2013 decision.

12 So the question, Your Honor, is not is this
13 perfect, could it be better, but is it reasonable. Is
14 it within the range of reason. And it clearly is.
15 Thank you.

16 THE COURT: Do you want your five minutes
17 now? You have a couple of minutes left on the expenses,
18 and I'll give you that opportunity to do that now.

19 MR. MILLER: Yes, Your Honor. I just want
20 to start with expenses, because if I run out of time, I
21 don't want to rush through that, because there has been
22 some talk about that already.

23 We seek \$3,499,839 total in expenses. Your
24 Honor should know that due to unexpected increases in
25 notice expenses, because we were able to obtain several

1 hundred thousand additional names for direct notice --
2 we always do direct notice whenever we can -- that is an
3 additional 146,000, which we will assume. We will not
4 seek reimbursement for that.

5 So even if there was some quibble about some
6 of our expenses, which are all supported by declaration,
7 they are all right down the heart of the plain, that
8 \$146,000 should give Your Honor a comfort that we are
9 being generous to the Class, which has been my mission
10 from day one ever since I got into this business.

11 The 2.5 million spent on Dr. Leitzinger was
12 absolutely necessary. With no expert, there is no case.
13 It was not that long after his deposition that we got
14 the settlement. That deposition and Dr. Leitzinger's
15 work was very, very important.

16 But what should not get lost here and one of
17 the reasons why this case was so tough, Dr. Leitzinger
18 could only find damages for about 13 of the 200
19 hospitals with MFNs. So this case was hardly a lay-up
20 and it is nowhere where the Eubert case or the
21 multibillion dollar case that the conflicted Varnum
22 objectors would like it to be.

23 As to our attorneys fees, they're right down
24 the heart of the plain. One-third is standard.
25 Percentage of benefits is standard. It aligns with

1 interests of the lawyers with the Class.

2 Had we used the antiquated lone star method
3 which invited the kind of fight that Mr. Andrews wants
4 to get into, it would have cost the Class five million
5 more dollars. But we don't think that is right.

6 We consistently apply percentage of the
7 benefits when it helps us and when it hurts us.

8 And as Mr. Small pointed out, it's only
9 point 645 of our hourly rate. It's not a great result
10 for the lawyers when you consider the size of the
11 lawyers involved in this Class case and the number of
12 lawyers.

13 It is uncontradicted, our briefing at pages
14 eight to 10, many cases awarding a third. That is
15 particularly appropriate where the multiple is point
16 645.

17 The value to the Class is 25 percent of the
18 overcharges, above the standard in the Liner Board case.

19 Risk of litigation is underestimated. Class
20 actions have gotten a lot harder since the Supreme
21 Court's decision in Duke v Wal-Mart.

22 We knew from day one we had a very tough
23 opponent with Blue Cross, which is, I think, one of the
24 reasons why we've got these Varnum objectors here. They
25 fight very, very hard, but they were very professional

1 in our case, and I give them that.

2 Lots of these cases lose, Your Honor. Every
3 single law firm in this state I'm sure has had seven
4 figure losses in class actions. There are lots of dry
5 holes in the class action business. I had what I
6 thought was a great case against Onstar and the
7 Honorable Judge Cox denied class cert and we lost
8 millions in that case.

9 Public policy supports this litigation.
10 Without it, there is no meaningful enforcement of
11 antitrust law as in the Hardison case.

12 The value of services on an hourly basis, we
13 had to do a huge amount of work, 169 depositions. I
14 have never been in a case with that many depositions and
15 that factor is not rebutted.

16 The quality of representation, I leave that
17 to Your Honor's judgment and discretion. You have seen
18 us, you will make your own opinion there.

19 The complexity of litigation, antitrust
20 litigation is among the most difficult in the country
21 as Judge Borman recently held in the In re Packaged Ice.
22 And for the first time in my career, I'm sitting down in
23 less than five minutes.

24 Oh, incentive awards, but I want to add one
25 thing that's not in our brief. These people are brave.

1 They put their name on a complaint against an insurer
2 that they depend upon. That they depend upon for
3 coverage for their families. They should get some
4 credit for that. And they did a lot of work other class
5 members didn't. That's why they should get it.

6 I think I misspoke, there are 70 MFN
7 hospitals, and if I misspoke, I apologize and I stand
8 corrected. And I will sit down. Thank you.

9 THE COURT: Mr. Hoffman, you're already
10 standing. You may proceed.

11 MR. HOFFMAN: Your Honor, I expect to use
12 less than the time you have allotted Blue Cross.

13 THE COURT: And include in this your
14 argument about fees and approval.

15 MR. HOFFMAN: Correct.

16 And in part, Your Honor, let me start by
17 saying that I'm not planning to address the claims
18 approval process or any of those things, I'm going to
19 talk just solely about one aspect of the settlement. If
20 Your Honor has any questions about the claim approval
21 process, the notice process or anything like that, we
22 would be happy to answer those. My colleague, Mr.
23 Stenerson, is prepared to address questions, and I'm
24 sure the Class Plaintiffs are as well, but I don't plan
25 to speak about those unless you would like to hear it.

1 Let me start by clearing up one inaccuracy
2 from the objectors' presentation, and then just frankly
3 say a few things about the adequacy of the settlement.

4 The inaccuracy is that the only class
5 certification report and motion and expert work that was
6 done here was done for settlement. The Varnum objectors
7 made that point. That is just simply wrong as Your
8 Honor knows.

9 The class certification motions were
10 prepared and Dr. Leitzinger's report was prepared and
11 our response to it was prepared and Dr. Sibley's report
12 in response was prepared all prior to any settlement.
13 There is no settlement there, those were papers that
14 were fighting as hard as possible on the Plaintiff's
15 side, I'm certain, to maximize the results they could
16 get, as you heard a minute ago, and from our side, to
17 point out what we thought were overwhelming flaws with
18 this case. With class certification and with every
19 aspect of the Plaintiff's ability to proceed with their
20 claims. And that, Your Honor, is where I want to turn
21 next.

22 Because, the objectors, I think, don't
23 fundamentally understand what this case about, and that
24 is illustrated by the very large numbers that they keep
25 throwing around.

1 So we're at a point, Your Honor, at this
2 late time in the day where you're hearing 118 million
3 dollars as if that is small, as if that is a subset of
4 the potential claims here. And, also as if somehow that
5 118 million dollars was relatively guaranteed or almost
6 a sure thing.

7 Now, Class Counsel said some things
8 explaining why it is not, but I want to touch on that a
9 little bit more.

10 The reality is that that 118 million dollars
11 was the Plaintiff's absolute best case on the merits.
12 In light of the risks the Plaintiffs face, I'm going to
13 talk about now, the amount of the settlement, 25 give or
14 take percent of the 118 million, is not only adequate,
15 but it is actually quite generous, and let me say why.

16 The objectors seem to have the idea that
17 this case is about how much the class members paid or
18 even possibly paid to hospitals. That is why you hear
19 these numbers that are in the billions. Or even perhaps
20 about how much overcharges they paid or something like
21 that. That is not what any of these cases are about.

22 The liability theory in this case, as Your
23 Honor knows, depends on a long hard chain of causation
24 in which the Plaintiffs have to prove that the MFNs,
25 number one, raised hospital costs so much. Number two,

1 at such a large percentage of Michigan's hospitals.
2 Number three, to such a large share of Michigan's
3 insurers. That, number four, those insurers across the
4 board were unable to compete with Blue Cross.

5 That is a very hard path. It takes a lot of
6 steps, and among other things, it requires showing a
7 pervasive effect that the MFNs has had across the state,
8 across hospitals on insurers all over the place. And on
9 all the insurers close to home.

10 What was absolutely clear by the time the
11 class certification issue was filed, and the class
12 certification issue is very forthright about this, and
13 the Plaintiff's Class when the evidence was done, and as
14 Mr. Small put it, when the data spoke, that claim was
15 unprovable.

16 Why was it unprovable? Because at the
17 overwhelmingly majority of Michigan hospitals, the MFNs
18 had no effect at all.

19 The class certification motion postulates as
20 Plaintiff's best case scenario that less than 10 percent
21 of Michigan hospitals were affected by the MFNs.
22 Thirteen hospitals out of those 130.

23 But it is much smaller than that, Your
24 Honor, because in the class certification motion, what
25 it also points out very forthrightly, and I think

1 Plaintiff's Counsel deserve a lot of credit for this, is
2 that not even all the insurers or all the claims at that
3 tiny subset of Michigan hospitals, it is only particular
4 insurers for particular products at some of those
5 hospitals.

6 And there is nothing in the class
7 certification motion about any effect of that on the
8 ability of insurers across Michigan to compete with Blue
9 Cross.

10 That is a long hard way away from creating
11 harm from competition. It underscores why the 118
12 million dollar number that Dr. Leitzinger proposed as
13 his damages number, and which Dr. Sibley pointed out he
14 thought was extremely vulnerable to attack, was almost a
15 Hail Mary, certainly a very aggressive hope-for best
16 case by the Plaintiffs.

17 So a settlement, Your Honor, and Your Honor
18 might say, well, if Blue Cross's case is so good, why is
19 Blue Cross settling? But of course Your Honor knows the
20 answer to that. These cases are very costly. They're
21 very distracting. We have been at this since the 2010,
22 incredibly. It has affected Blue Cross's executives,
23 and we, frankly, don't like to be in a situation where
24 we are at cross purposes with people who are members of
25 Blue Cross or potential members of Blue Cross.

1 So the Company wants to get these cases
2 behind it.

3 Paying 25 percent of Plaintiff's maximum
4 possible recovery, even though we thought we would
5 defeat that, either at the class certification stage or
6 at summary judgment or at trial, but paying 25 percent
7 of it is worth it for us.

8 But I don't want the magnitude of that
9 number to be lost to the Court or drowned out in these
10 huge irrelevant numbers that are being thrown out.

11 It is a great recovery for the Class because
12 the claim turned out to be so weak. Thank you.

13 THE COURT: I think Mr. Andrews reserved a
14 minute; is that right?

15 MR. ANDREWS: Yes, I asked a question to you
16 and maybe you can ask Mr. Miller, or I can bring or I
17 could bring Mr. Miller to the stand.

18 THE COURT: Oh, I don't think that is
19 probably necessary, do you? Or maybe you do, but I
20 don't think it is really necessary.

21 MR. ANDREWS: I pass.

22 THE COURT: You're passing your one minute?

23 MR. ANDREWS: Yes.

24 THE COURT: So we're not hearing anything
25 further, everyone has argued all they want to argue on

1 the attorney fees and final approval; is that right?

2 MR. MILLER: Yes, Your Honor.

3 MR. HOFFMAN: Yes, Your Honor.

4 THE COURT: So we're finished.

5 I'm taking on briefs the motion to strike
6 the surreply of Mr. Andrews and on brief the responses
7 and motion to intervene for a limited purpose to respond
8 to the opposing motion to unseal by 26 objectors that is
9 filed by -- those are filed by Mid-Michigan, Alpena,
10 Priority Health, Holland Community and Ascension Health;
11 is that correct?

12 Very good. Anything else?

13 MR. MILLER: No, Your Honor.

14 MR. HOFFMAN: No, Your Honor.

15 THE COURT: I do have one question, I don't
16 know who this goes to, but in one of the objections
17 there was a concern about the fact that they had and
18 what they believed to be, this was not their word, but
19 cumbersome application claim form. And that they made
20 some telephone calls to someone and they had not gotten,
21 for lack of a better word, a response that satisfied
22 them. Those are much kinder words --

23 MR. WALTERS: I don't know if that was us,
24 but I did reference Petoskey Plastics, one of our
25 clients, that went through a fairly extensive process to

1 try to get claims information from Blue Cross. They did
2 ultimately submit a claim just within the last couple of
3 days, but it took my clients about six hours worth of
4 time to overall get the information from Blue Cross
5 necessary to file the claim. I'm not sure if that is
6 what you're referring to or not.

7 THE COURT: I thought it was in the
8 objection letters.

9 Anybody else recalls it or responding to it?

10 It's in Mr. Mancinelli's objection. He is
11 the gentleman who wrote an objection but did not appear.
12 Do you recall that?

13 MR. STENERSON: Your Honor, Todd Stenerson
14 on behalf of Blue Cross.

15 THE COURT: You want to respond to that?

16 MR. STENERSON: Your Honor, I can respond
17 generally. I did not speak to Mr. Mancinelli, but
18 generally I can represent to the Court that Blue Cross
19 Counsel has worked with Class Counsel and the settlement
20 administrator since the beginning of the settlement to
21 simplify the claims process and to provide less
22 information to make a claim in order to maximize the
23 claims. And that Blue Cross, the company, has responded
24 to over 225 inquiries from corporate entities and
25 provided information so they could participate in the

1 settlement, including Mr. Walters's clients.

2 And our incentives and directions to the
3 Class Counsel and to the settlement administrator has
4 been and will continue to be that people should be able
5 to make claims and maximize the recovery. And there is
6 a deficiency process in the claims administration where
7 if the claims administration does not have enough
8 information, Class members will have the opportunity to
9 cure any issues and that the parties' goal is to
10 maximize claims.

11 THE COURT: So how will that person get that
12 information? How will that be monitored?

13 MR. STENERSON: Well, anything that comes to
14 my attention personally, Your Honor, is handled and I
15 have handled it. And the settlement administrator, I
16 believe, has had 140 days worth of live phone calls with
17 Class members.

18 So the class administrator has been
19 conveying that information and will continue to do so
20 throughout the process.

21 But that is a process that's more directly
22 managed by Class Counsel, so they may have some
23 information to add.

24 THE COURT: Do you want to respond to that?

25 MR. SMALL: Yes, Your Honor.

1 Obviously, this is a very big Class, and
2 we've, I think, we engaged in very extensive efforts to
3 assist those who asked for information. So we will just
4 give you some information about the ways we have done
5 that.

6 As you know, we set up a Web site to provide
7 information about the settlement. That has had five
8 million plus hits by over a hundred thousand unique
9 visitors.

10 We have a phone call center that the
11 settlement administrator operates, as Mr. Stenerson just
12 said, has provided over 200,000 minutes of live operator
13 time assisting class members with their inquiries. And
14 that does translate into about 140 days worth of
15 conversations with class members or potential class
16 members.

17 Your Honor, we also relaxed the filing
18 requirements for individual consumers who wanted to file
19 a claim. Originally we had required that they provide
20 documentation of their purchases, but when we got
21 feedback from class members that that could be onerous
22 in situations where they did not have their own records
23 or could not obtain records readily, we put aside the
24 requirement to submit any supporting documentation with
25 their claim and allowed them simply to fill out the

1 claim form and sign it under oath with the only
2 reservation being that the settlement administrator
3 believes that there is fraud involved with the claim,
4 the settlement administrator reserves its right to ask
5 for documentation later to determine whether there, in
6 fact, has been fraud.

7 With respect to self-insured and insurer
8 claimants, we have been very explicit with them that if
9 the most convenient way to provide their supporting
10 documentation is by simply doing a data extract from
11 their database, that they may do that, and provide a
12 declaration simply attesting that the information they
13 are providing is authentic, and that seems to have
14 streamlined the claims process both for consumers and
15 for insurers and self-insured entities.

16 And it is, as Mr. Stenerson said, our goal
17 is to get the best claims rate possible. We want as
18 many class members to share in this recovery as possible
19 and we're attempting our best to assist everyone.

20 I know my firm has received calls or had
21 calls referred to us by the settlement administrator and
22 we dealt with every one we received and will continue to
23 do that, Your Honor.

24 THE COURT: How do people know about this
25 process relative to documentation that they have to

1 produce?

2 MR. SMALL: The claim form itself states
3 what the documentation is that they're required to
4 provide. In addition, the Web site says that. In
5 addition, the telephone voice system that the settlement
6 administrator set up will provide that information.
7 And in addition, Class Counsel will provide that
8 information if asked.

9 MR. GUSTAFSON: Your Honor, Dan Gustafson.
10 I just want to make one more point. If a class member
11 submits a claim and it is missing something, the notice
12 administrator will contact them and give them a chance
13 to fix it.

14 So if they do something and it isn't right,
15 it's not going to bar their claim, they're going to get
16 a chance to fix it, and that is part of the ongoing
17 claims process that we're undertaking now.

18 THE COURT: So that doesn't take care of a
19 person who says I can't provide the documentation so I'm
20 not filing it. That is somebody who filed, they have
21 included everything and have an opportunity to cure,
22 right, but what about the person who looked at it and
23 said I can't support it because I can't find all of
24 this?

25 MR. GUSTAFSON: The opportunity to cure

1 doesn't solve the problem that you raise, but when
2 people contact the claims administrator and say I can't
3 get my records, we say to them file a claim and we'll
4 work through with you.

5 THE COURT: But what about the people who
6 are chilled, how do they know that will happen?

7 MR. GUSTAFSON: Your Honor, there may very
8 well be some people who look at it and say I'm not going
9 to bother, but we can't stop the apathy.

10 There is certainly the notion that some
11 people are going to say I don't want to go through this
12 trouble, but to the extent that they call and say it is
13 too much trouble, we say file a claim, we will help you.
14 To the extent that they file a claim and they don't get
15 it right, we try to fix it for them.

16 THE COURT: Anybody else want to be heard on
17 this side? No.

18 MR. HOFFMAN: No, Your Honor.

19 THE COURT: Very good, thank you all for
20 your arguments and I will give you a written order.

21 (Proceedings concluded at 3:55 p.m.)

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C E R T I F I C A T I O N

I, CHERYL E. DANIEL, Official Federal Court Reporter, after being first duly sworn, say that I stenographically reported for foregoing proceedings held on the day, date, time and place indicated. That I caused those stenotype notes to be translated through Computer Assisted Transcription and that these pages constitute a true, full and complete transcription of those stenotype notes to the best of my knowledge and belief.

I further certify that I am not of counsel nor have any interest in the foregoing proceedings.

/S/

CHERYL E. DANIEL,

FEDERAL OFFICIAL COURT REPORTER